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No. 08-721

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FIRST AMERICAN TITLE INSURANCE COMPANY AND OLD REPUBLIC NATIONAL TITLE INSURANCE COMPANY,
Petitioners,

v.

SUSAN COMBS, COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, AND GREGG ABBOTT, ATTORNEY GENERAL OF TEXAS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Nearly all States have retaliatory tax statutes that impose additional taxes on out-of-state insurance companies whenever the insurance company's home State imposes higher insurance taxes than the retaliating State does. Texas recently reinterpreted its retaliatory tax statute so that 85% of the premium taxes it collects from out-of-state title insurers are ignored in comparing tax burdens, dramatically increasing the amount of retaliatory tax that out-of-state insurance companies must pay. Four justices of the Texas Supreme Court concluded that the State's new interpretation violates the Equal Protection Clause under this Court's precedents. The question presented is:

Whether Texas's new interpretation of its retaliatory tax violates the Equal Protection Clause.

PARTIES TO THE PROCEEDINGS BELOW

Carole Keeton Strayhorn, former Comptroller of Public Accounts of the State of Texas, was a defendant in the district court and an appellee in the court of appeals. All other parties to the proceedings are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioner First American Title Insurance Company is a wholly owned subsidiary of The First American Corporation, a publicly traded company. The First American Corporation has no parent corporation, and no publicly traded company owns 10% or more of its stock.

Petitioner Old Republic National Title Insurance Company is a wholly owned subsidiary of Old Republic International Corporation, a publicly traded company. Old Republic International Corporation has no parent corporation, and no publicly traded company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners First American Title Insurance Company and Old Republic National Title Insurance Company respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Texas in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Texas (App., *infra*, 1a-35a) is published at 258 S.W.3d 627 (Tex. 2008). The opinion of the Court of Appeals for the Third Appellate District of Texas (App., *infra*, 36a-60a) is published at 169 S.W.3d 298 (Tex. App. 2005). The orders and judgments of the District Court of Travis County, Texas (App., *infra*, 61a-64a) are unreported.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Texas was entered on May 16, 2008. The court denied rehearing on August 29, 2008 (App., *infra*, 65a), and issued a corrected opinion the same day (App., *infra*, 1a-35a). This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Relevant provisions of the Texas Insurance Code are set forth in the Appendix (App., *infra*, 66a-72a).

INTRODUCTION

This case arises out of Texas's decision to reinterpret its retaliatory tax to increase dramatically the burdens on out-of-state—and only out-of-state—insurance companies. The Texas Supreme Court upheld the State's new interpretation, over the dissent of four justices who concluded that it "makes no sense" and constitutes "blatant and unapologetic discrimination against out-of-state insurers" in violation of the federal Equal Protection Clause. App., *infra*, 34a-35a. Unless corrected, the state court's decision will threaten grave harm to the nationwide insurance industry. Accordingly, this Court should grant review.

STATEMENT

I. BACKGROUND

A. Retaliatory Taxes

For more than a century, States have imposed retaliatory taxes designed to "equalize the tax burdens borne by [domestic] and foreign-based * * * insurance companies." App., *infra*, 1a-2a, 5a. Under a typical regime, retaliatory taxes apply to out-of-state insurance companies whenever the out-of-state insurance company's home State imposes higher insurance taxes than the retaliating State. See *id.* at 4a. For example, if Maryland imposes premium taxes of 2% on insurance companies while Mississippi imposes premium taxes of 3%, an insurer from Mississippi doing business in Maryland would have to pay to Maryland not only the 2% premium tax that all insurers pay, but also an additional 1% retaliatory tax measured by the difference between the two States' tax rates. In theory, that additional tax would encourage Mississippi to lower its premium taxes to Maryland's rate, thus fostering more modest and uniform taxation of insurance companies across the country. See *id.* at 4a-5a; L. Russ, *Construction, Application, and Operation of State "Retaliatory" Statutes*, 30 A.L.R. 4th 873 (1984).

In *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), this Court upheld California's retaliatory tax—a typical retaliatory tax statute—against a claim that it unfairly discriminated against out-of-state insurers. The Court stated that, although Congress removed all Commerce Clause limitations on state insurance regulation by passing the McCarran-Ferguson Act, Pub. L. No. 79-15, 59 Stat. 33 (1945), that Act did not "alter[] constitutional standards other than those derived from the Commerce Clause," and thus "the Equal Protection Clause remains as a possible ground for invalidation of the California tax." 451

U.S. at 653, 656 & n.6. The Court held, however, that the tax did not violate equal protection. *Id.* at 674. The Court saw a legitimate purpose of "promot[ing] the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes." *Id.* at 668-671. The Court also found it "reasonable for California's lawmakers to believe that use of the challenged classification would promote that purpose." *Id.* at 671-674. Justice Stevens and Justice Blackmun dissented, arguing that the tax constituted "flagrant discrimination" against non-resident insurers. *Id.* at 674-675.[1]

B. Texas's Taxation of Title Insurers

1. Title insurance indemnifies the insured against losses from defects in, or encumbrances upon, title to real property. See 1 J. Palomar, *Title Insurance Law* § 1:8, at 1-21 (rev. 2008). In addition to agreeing to compensate the insured if such defects emerge, title insurers seek to eliminate the risk of title defects in advance by searching real property records before a transaction closes. See *id.* § 1:15, at 1-36. That "risk-elimination" component is, in fact, "the main focus of title insurance, with the major portion of the title insurance premium going toward its cost." *Id.* § 1:15, at 1-38; see also Am. Land Title Ass'n, *Title Insurance: A Comprehensive Overview* 2, http://www.alta.org/about/TitleInsuranceOverview.pdf.

Title insurance companies often do business through "title agents"—distinct business entities that are contractually authorized to sell and issue policies on the insurance company's behalf. See App., *infra*, 2a; Tex. Ins. Code § 2501.003(13). Typically, the title agent performs the title search and other closing functions, while the insurance company underwrites the policy and remains

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[1] The Solicitor General had also filed a brief urging the Court to strike down the tax. See U.S. Br. in No. 79-1423, 1980 WL 339814, at *8 (July 1980).

responsible for paying any claims. See Tex. Ins. Code § 2501.003(12)-(14).

Title insurance companies and their agents divide the premium revenue collected by the agents for the policies they sell. In some States, that division of premium revenue is set by contract between the insurance company and its agents. See, *e.g.*, Cal. Ins. Code § 12412. In other States such as Texas, state regulators prescribe a fixed division of premium. See App., *infra*, 2a-3a. In the relevant period, the Texas Department of Insurance prescribed an 85/15 split—title agents kept 85% of the premium revenue and the insurance company kept the other 15%. *Id.* at 3a. The total premium is often referred to as the "gross" premium, and the insurance company's share as the "net" premium.

2. Texas, like other States, imposes premium taxes on title insurance premium revenue. App., *infra*, 1a. The premium tax statute in effect at the relevant time provided that "[e]ach *title insurance company* receiving premiums from the business of title insurance shall pay to the comptroller a tax on those premiums" at an annual rate of 1.35%. Tex. Ins. Code art. 9.59, §§ 1, 4 (2004) (emphasis added).[2] The statute clarified that "[t]he premium tax is levied on all amounts defined to be premium in this Chapter, *whether paid to the title insurance company or retained by the title insurance agent*, such tax being in lieu of the tax on the premium retained by the agent," and recited that the State "facilitates the collection of the premium tax on the premium retained by the agent by setting the division of the premium between insurer and agent so that the insurer receives the premium

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[2] The statute has been recodified and now appears, reworded, at Tex. Ins. Code §§ 223.001-.011. The recodifying act states that it is "intended as a recodification only" and that "no substantive change in law is intended." 2003 Tex. Sess. Law Serv. ch. 1274, § 27.

tax due on the agent's portion of the premium and remits it to the State." *Id.* § 8(b) (emphasis added). Thus, the premium tax is imposed on the total *gross* amount of the premium (*i.e.*, both the 15% share that the insurance company receives and the 85% share that the title agent retains), and it is collected from the insurance company, not the agent. See App., *infra*, 3a-4a. The premium tax applies equally to Texas-based insurance companies and out-of-state insurance companies selling policies in Texas. See *id.* at 4a.

In addition to the premium tax, Texas also imposes a retaliatory tax on out-of-state insurance companies. Like other States, Texas traditionally calculated that tax by comparing the tax burdens that Texas imposes on out-of-state insurers with the tax burdens the other State imposes on Texas insurers. At the time relevant to this dispute, Texas's statute provided:

> Whenever by the laws of any other state or territory of the United States any taxes * * * are imposed upon any insurance company that is organized in this State and licensed and is doing business or that may do business in such other state or territory which, in the aggregate are in excess of the aggregate of the taxes * * * directly imposed upon a similar insurance company of such other state or territory doing business in this State, the comptroller shall impose upon and collect from any similar company of such state or territory * * * the same taxes * * * .

Tex. Ins. Code art. 21.46, § 1(a) (2004).[3]

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[3] The current provisions appear at Tex. Ins. Code §§ 281.001-.008. As noted above, the recodifying act states that there was no substantive change in the law. See n.2, *supra*.

II. PROCEEDINGS BELOW

A. The State's New Interpretation of Its Retaliatory Tax

Traditionally, out-of-state title insurance companies counted the entire amount of premium tax they remitted to Texas when computing their Texas retaliatory tax. See App., *infra*, 5a. For example, a Minnesota title insurance company doing business in Texas would calculate its retaliatory tax by comparing Minnesota's 2% premium tax rate with Texas's 1.35% premium tax rate. Compare Minn. Stat. § 297I.05(1) with Tex. Ins. Code art. 9.59, § 4 (2004). The retaliatory tax would be the difference between those two rates—0.65%. See Tex. Ins. Code art. 21.46, § 1(a) (2004). When added to the 1.35% Texas premium tax, the Minnesota insurance company would pay a total of 2%—the same amount a Texas insurer would pay in Minnesota. If another State had a premium tax rate that was equal to or less than Texas's rate, an insurer from that State would not pay any retaliatory tax in Texas at all.

As the Texas Supreme Court explained, "[t]his system * * * operated with minimal change until a few years ago when the [Texas] Comptroller reinterpreted the retaliatory tax statute in a way that sharply increased the tax liability of certain non-Texas title insurers." App., *infra*, 2a. In 1996, the Comptroller adopted a "new rule" that "resulted in a new method of calculating the retaliatory tax." *Id.* at 5a. "The Comptroller reasoned that because title insurers keep only 15% of premiums collected on agent-issued policies * * * foreign title insurers could count only that 15% when figuring the amount of retaliatory tax owed." *Ibid.*

That change dramatically altered the calculation of retaliatory tax in Texas. Formerly, an out-of-state insurer compared the total tax it remitted to Texas to the total

tax an insurer would pay in its home State. Now, the out-of-state insurer has to exclude from that comparison 85% of the premium tax that Texas collects from the insurer. "The result of this new math: the foreign insurers' premium tax liability dropped compared with what other states imposed on Texas insurers, thus substantially increasing the foreign insurers' retaliatory tax liability." App., *infra*, 5a.

The State's new approach substantially increases the retaliatory taxes imposed on out-of-state insurers. For example, a Minnesota title insurance company doing business in Texas would continue to remit 1.35% in premium taxes. In calculating its retaliatory tax, however, it would be deemed to have paid only 15% of that amount (*i.e.*, 0.203%). The retaliatory tax would thus be based on the difference between Minnesota's 2% rate and *15% of Texas's 1.35%* rate. See App., *infra*, 27a-28a. The insurer would thus pay a retaliatory tax of 1.797% (*i.e.*, 2% – 0.203%), which—when combined with the 1.35% premium tax—would yield total taxes of 3.147%. See *ibid.* That 1.797% retaliatory tax is almost *three times* the amount the insurance company would have paid under the Comptroller's longstanding prior approach (0.65%). And the total amount of tax the insurance company now remits to Texas (3.147%) is substantially higher than either the amount Texas collects from its own domestic insurers (1.35%) or the amount that Minnesota collects from either Texas or Minnesota insurers (2%).

Texas's new approach results in retaliatory taxes even where the other State imposes *lower* premium taxes than Texas does. See App., *infra*, 28a. Insurers from a State with a 1% premium tax, for example, would not have paid any retaliatory tax under Texas's old regime, because that 1% rate is lower than Texas's 1.35% rate. Under the State's new interpretation, however, the insurers *would*

have to pay, because 1% is higher than 15% of Texas's 1.35% rate. See *ibid.*

B. Proceedings in the District Court and Court of Appeals

First American Title Insurance Company and Old Republic National Title Insurance Company are out-of-state title insurance companies that do business in Texas. App., *infra*, 2a. First American is domiciled in California, and Old Republic is domiciled in Minnesota. *Ibid.* As a result of the Comptroller's new interpretation, First American paid an additional $1.4 million in retaliatory tax for tax years 2001 and 2002, and Old Republic paid an additional $219,000 for tax year 2002. *Id.* at 6a. After paying those amounts under protest, both companies sued for refunds, claiming that the Comptroller had misinterpreted the Texas Insurance Code and that the new interpretation violated the federal and state Equal Protection Clauses. See *ibid.*; First Am. Compl. ¶ 26; Old Rep. Compl. ¶ 28.

The district court rejected both suits on summary judgment. See App., *infra*, 61a-64a. The insurance companies appealed to the Court of Appeals for the Third Appellate District, and the suits were consolidated. *Id.* at 37a n.1. Petitioners renewed their statutory and constitutional arguments, including their federal equal protection claim. See Tex. C.A. Br. 30-37. The court of appeals affirmed. App., *infra*, 36a-60a.

C. Proceedings in the Supreme Court of Texas

The Supreme Court of Texas granted discretionary review. Petitioners again urged that the Comptroller had misconstrued Texas law and violated the state and federal Equal Protection Clauses. See Tex. Sup. Ct. Br. 14-23. On May 16, 2008, the court affirmed by a divided 5-4 vote. App., *infra*, 1a-35a.

1. The court first rejected petitioners' argument that the Comptroller had misconstrued Texas law. It acknowledged that the State had departed from its longstanding interpretation. App., *infra*, 2a. But it opined that the new interpretation was "reasonable and in harmony with the statute's plain meaning." *Id.* at 10a.

The court then rejected petitioners' claims under the federal Equal Protection Clause (as well as the state Equal Protection Clause, which it construed to be coextensive). App., *infra*, 20a. As the court recognized, this Court's decision in *Western & Southern* requires two inquiries: (1) whether the tax has a legitimate purpose, and (2) whether the tax can reasonably be expected to promote that purpose. *Ibid.*

Petitioners urged that the State's new interpretation does not serve the legitimate purpose of deterring excessive taxation in other States because "foreign states would have to reduce premium tax rates by as much as 80% to match the premium tax burden imposed on insurers by Texas law." App., *infra*, 21a. The court did not dispute that that was the result of the State's new interpretation, but perceived a legitimate purpose nonetheless, citing several considerations. First, "[t]he Comptroller did not develop this scheme independently as a revenue-raising plan," but was merely implementing "the statutory scheme developed by the Legislature." *Ibid.* Second, the "Comptroller's construction of the retaliatory tax system does not impermissibly discriminate against foreign title insurers" because "[a]ll title insurers operating in Texas, whether domestic or foreign, are subject to the 85/15 premium tax division." *Id.* at 21a-22a. Finally, "foreign title insurers are not taxed merely because they are foreign; they are taxed only if their home states impose higher financial obligations on Texas insurers than Texas imposes on foreign insurers," and the increase in retaliatory taxes under the State's new interpretation

"depends just as much on premium tax rates charged by other states as it does on the Comptroller crediting title insurers with only 15% of the total premium tax payment." *Id.* at 22a. While the State's interpretation "may have unforeseen or unintended results," the court explained, that does not make it unconstitutional. *Ibid.* The interpretation "exerts some downward pressure on foreign tax rates," the court claimed, and thus reflects a "legitimate state purpose of protecting Texas title insurers by pressuring other states to keep their premium taxes low." *Ibid.*

Turning to the second *Western & Southern* prong, the court held that the State rationally could have believed that "reducing the premium tax burdens Texas imposes on title insurers operating here would encourage other states to impose lower financial obligations on Texas title insurers operating elsewhere." App., *infra*, 22a. The court rejected the argument that there was "'no rational basis for comparing 100% of another state's premium taxes with 15% of Texas' premium taxes.'" *Id.* at 22a-23a. In the court's view, the 85% of the premium tax now deemed paid by the agent was irrelevant: "[T]he correct comparison," it asserted, "is between the taxes imposed on insurance companies, not insurance premiums or insurance industries." *Id.* at 23a. The court defended that conclusion on the ground that "[t]he equal protection clause guarantees that similarly situated persons—not similarly situated tax schemes or similarly situated industries—be treated similarly." *Ibid.*

2. Justice Hecht dissented, joined by Justices Wainwright, Brister, and Medina. App., *infra*, 24a-35a. The dissent acknowledged that the Texas retaliatory tax, as previously applied, was constitutional under *Western & Southern*. *Id.* at 25a-26a. In the dissent's view, however, the State's "sudden departure from the settled application" of the tax "violates Equal Protection." *Id.* at 26a.

"For decades," the dissent explained, "the retaliatory tax in Texas and other states has been determined by comparing the taxes on total premiums, not just the insurer's share." App., *infra*, 27a. But "the Comptroller now takes the position that 'total' means 100% in every other state and 15% in Texas." *Ibid.* By "artificially reducing the size of Texas' premium tax" by 85% when determining whether to impose a retaliatory tax, the State's new interpretation would result in retaliatory taxes "even when insurers hail from states imposing lower premium taxes than Texas." *Id.* at 28a. The tax would thus "no longer operate[] to discourage excessive taxation in other states." *Ibid.*

While the majority had focused on the insurance company's share of the premium tax to the exclusion of the agent's share, the dissent found it "myopic to view a tax on gross revenue as affecting only some of the participants in the business who must share that revenue." App., *infra*, 33a. "[B]y comparing only the insurer's share of the Texas premium tax to another state's undivided premium tax," the dissent explained, "the Comptroller imposes and collects the retaliatory tax in a different manner and for a different purpose than the other state in imposing and collecting its tax." *Id.* at 34a. That was impermissible because the retaliatory tax statute "clearly requires the Comptroller to make apples-to-apples comparisons." *Id.* at 33a.

The majority's position, the dissent argued, "makes no sense." App., *infra*, 34a. *Western & Southern* found a legitimate interest in deterring other States from enacting excessive taxes. *Ibid.* But the dissent saw "no rational basis for comparing 100% of another state's premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive." *Ibid.* The State's legitimate interests were not served by "retaliating whenever another state's industry-wide tax

would exceed Texas' tax on some of the participants, or whenever another state employs a different accounting method for calculating and assessing premium taxes." *Ibid.* The State's new interpretation amounted to "blatant and unapologetic discrimination against out-of-state insurers and parochial protectionism." *Ibid.* Concluding that "[t]he Comptroller's treatment of Texas title insurers doing business in other states and out-of-state title insurers doing business in Texas is as equal as 15 is to 100," the dissent urged that "the Comptroller's position is not permitted by * * * the Fourteenth Amendment." *Id.* at 35a.

3. Petitioners moved for rehearing or clarification. On August 29, 2008, the court denied rehearing but issued a corrected opinion. App., *infra*, 65a.[4]

REASONS FOR GRANTING THE PETITION

As four justices of the Texas Supreme Court correctly concluded, Texas's new interpretation of its retaliatory tax divorces that tax from any legitimate purpose. For years, Texas calculated retaliatory tax by comparing the actual amount an insurance company remitted in Texas to the amount an insurance company would pay in the other State. Then, without any change in the statute or the economics of the transaction, the Comptroller decided that insurance companies "pay" only 15% of the amount they remit. The other 85% is now deemed paid by title agents, and thus excluded from the retaliatory tax calculation. Because Texas alone excludes 85% of the taxes it collects from insurance companies in calculating retaliatory tax, the State's new interpretation effectively

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[4] The corrected version eliminated a portion of one sentence that had erroneously suggested that petitioners did not preserve one aspect of their constitutional claim. It deleted the words "The insurers do not challenge this point, and," which formerly preceded the sentence "We have no trouble concluding that * * * " on page 22a.

compares 100% of taxes elsewhere with 15% of taxes in Texas. The dissent's thorough refutation of the majority's unconvincing analysis upholding that interpretation is incontrovertible: The State's "new math" simply "makes no sense"—it represents "blatant and unapologetic discrimination against out-of-state insurers and parochial protectionism." App., *infra*, 34a.

The Texas Supreme Court's decision warrants review. Retaliatory taxes are ubiquitous. Although this Court upheld the basic concept of a retaliatory tax in *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648 (1981), those taxes remain fertile ground for litigation where state authorities rely on irrational interpretations to justify arbitrary discrimination against out-of-state insurance companies. Some state courts have invoked the Equal Protection Clause to reject such interpretations; others have allowed them. See pp. 16-20, *infra*. The Texas Supreme Court's decision, however, effectively licenses States to impose retaliatory taxes on out-of-state insurance companies regardless of whether other States impose higher or lower taxes. The predictable result of that decision will be renewed vigor on the part of tax authorities in other States to devise their own clever ploys for raising revenue from out-of-state insurance companies, as well as counter-retaliation designed to defend a State's own insurers (which one State has already indicated it may impose, see p. 24, *infra*). At best, insurance companies will continue to face arbitrary discrimination; at worst, the Texas Supreme Court's decision could herald a retaliatory tax war.

Wholly apart from the issue's importance to the industry, the Texas Supreme Court's decision warrants review because it authorizes blatant, parochial discrimination against non-residents in violation of this Court's precedents. A long line of this Court's cases makes clear that the Equal Protection Clause prohibits arbitrary discrimi-

nation against non-resident insurance companies. The Texas Supreme Court's decision renders those constraints meaningless. As the dissent below explained, there is "no rational basis for comparing 100% of another state's premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive." App., *infra*, 34a. The State's "new math" completely strips the retaliatory tax of its equalizing character, and thus its legitimacy and rationality as well.

I. THE TEXAS SUPREME COURT'S DECISION IS A MATTER OF GREAT IMPORTANCE TO THE NATION'S INSURANCE INDUSTRY

The Texas Supreme Court's decision is of vital interest to the insurance industry. Constitutional litigation over retaliatory taxes is routine. And the decision below dramatically alters the legal landscape for those challenges.

A. Retaliatory Taxes Regularly Spawn Constitutional Disputes

The constitutional issues implicated by the Texas Supreme Court's decision arise time and again. All States other than Hawaii have retaliatory taxes. See App., *infra*, 73a-74a (collecting statutes). While the statutes differ in their particulars, they share the same essential feature: They impose taxes on out-of-state insurers whenever the insurer's home State taxes insurers more heavily than the retaliating State does. See *ibid.*

In *Western & Southern*, this Court addressed the constitutionality of California's retaliatory tax—a typical retaliatory tax statute. See 451 U.S. at 650-651. The Court recognized the long pedigree of retaliatory taxes like California's, and perceived a legitimate purpose of "promot[ing] the interstate business of domestic insurers by deterring other States from enacting discriminatory or excessive taxes"—in other words, "'put[ting] pressure on the several states to impose the same tax burden on all

insurance companies.'" *Id.* at 668-671. The Court also found it reasonable to believe that the tax would promote that purpose, in part because there was some empirical evidence (albeit mixed) that retaliatory taxes like California's had moderated and equalized tax burdens. See *id.* at 671-674.

In the wake of *Western & Southern*, state courts have repeatedly been called upon to address the constitutionality of retaliatory taxes that go beyond the plain-vanilla tax at issue in *Western & Southern* itself. Disputes are particularly common where tax authorities insist on interpretations that divorce the tax from its traditional legitimate purpose. The Equal Protection Clause plays an important and recurring role in those disputes.

1. Recently, for example, the New Jersey Supreme Court considered a federal constitutional challenge to an interpretation of that State's retaliatory tax in *American Fire & Casualty Co.* v. *New Jersey Division of Taxation*, 912 A.2d 126 (N.J. 2006). New Jersey has a unique "premium tax cap statute" that limits the premium taxes an insurer (foreign or domestic) pays if it does a specified amount of business in the State. *Id.* at 129. The state Division of Taxation, however, had interpreted the retaliatory tax to negate any benefits foreign insurers would receive under the cap. See *id.* at 132. The result was that out-of-state insurers would pay substantial retaliatory taxes, without regard to whether their home State's premium tax rate was higher or lower than New Jersey's stated rate. See *id.* at 137-138.

The New Jersey court of appeals held the Division's interpretation unconstitutional under the Equal Protection Clause. See 868 A.2d 346, 363 (N.J. Super. Ct. App. Div. 2005). Although *Western & Southern* recognized "the promotion of interstate business as a justification for an otherwise suspect or forbidden retaliatory tax," the court explained, the interpretation adopted by the Divi-

sion of Taxation "cannot reasonably be expected to produce these results." *Ibid.* Whereas *Western & Southern* involved "a nationally adopted taxation regime enacted to pressure states into achieving parity in taxation," the Division's aberrant interpretation "creat[ed] an unjustifiable domestic preference" that was "purely and completely discriminatory." *Ibid.*

The New Jersey Supreme Court affirmed, describing the intermediate court's decision as a "well-reasoned opinion." 912 A.2d at 132. The Division's interpretation, the court held, "fail[ed] to promote the retaliatory tax statute's purpose of encouraging 'even-handed treatment' of insurers between states" because it did not make a meaningful comparison of state tax burdens. See *id.* at 137. Even "foreign insurers * * * who hail from states with a *lower* tax rate than New Jersey's stated rate of 2.1% would still pay retaliatory tax" in many cases. *Ibid.* (emphasis added). Foreign insurers could avoid retaliation only if their home States reduced premium tax rates well below New Jersey's stated rate—in one example, to roughly *one-sixth* of New Jersey's stated rate. See *id.* at 137-138. Because it was unlikely that other States would reduce their premium tax rates so dramatically, the court found it "evident that the Director's application of retaliatory tax is not intended to 'apply pressure on other States to maintain low taxes on [New Jersey] insurers,' but rather, is intended to generate revenue." *Id.* at 138 (quoting *Western & Southern*, 451 U.S. at 669-670) (citation omitted). That determination raised "significant constitutional questions" under the Equal Protection Clause, which the court avoided by rejecting the Division's interpretation. *Ibid.*

New York's highest court confronted a similar issue in *United Services Automobile Ass'n* v. *Curiale*, 668 N.E.2d 384 (N.Y. 1996). New York imposes on insurers, in addition to premium taxes, a special mass-transit surcharge.

Id. at 385. New York law, however, specifically prohibited foreign insurers from counting that surcharge when computing retaliatory taxes. *Id.* at 385-386. A Texas automobile insurer challenged that provision under the Equal Protection Clause. *Id.* at 386-387.

The Court of Appeals observed that, under *Western & Southern*, "a system of retaliatory taxation, which by definition discriminates between domestic and foreign insurance companies, is constitutionally sound insofar as it aims to equalize the tax burden of domestic and foreign insurers, but the imposition of retaliatory tax beyond the point of equalization solely to generate revenue at the expense of foreign insurers lacks legitimacy." 668 N.E.2d at 388. "In other words," the court continued, "absent a legitimate purpose apart from simple revenue creation, a State may only retaliate to the extent of the difference between its actual and the foreign State's hypothetical tax bill." *Ibid.* The court held the denial of a credit for the surcharge unconstitutional under that standard because "the validating purpose of retaliatory taxation—to equalize the tax burden of domestic and foreign insurers– requires that the retaliatory tax assessment take into account the amount of taxes already paid to the State by the foreign insurer." *Id.* at 388-389. Because the State had attempted to tax "beyond the point of equalization," the denial of the credit was "unsupported by a legitimate purpose and therefore violate[d] the Equal Protection Clause." *Id.* at 389.

2. The Texas Supreme Court's decision below, by contrast, holds that the Equal Protection Clause allows States to calculate retaliatory tax by ignoring 85% of the amount the insurance company remits. See App., *infra*, 20a-23a. The tax is constitutional, the court believed, because it still "exerts some downward pressure on foreign tax rates." *Id.* at 22a. The dissent, by contrast, saw "no rational basis for comparing 100% of another state's

premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive." *Id.* at 34a.

Although the particular statute at issue here differs from the statutes at issue in *American Fire* and *Curiale*, those cases and the decision below reach opposite results on parallel constitutional issues. The New Jersey Supreme Court rejected the tax division's position because it would impose retaliatory taxes even on insurers who "hail from states with a *lower* tax rate than New Jersey's." *American Fire*, 912 A.2d at 137 (emphasis added). And the New York Court of Appeals rejected the State's position because it would tax "beyond the point of equalization." *Curiale*, 668 N.E.2d at 389. As the dissent below points out, Texas's new interpretation has precisely the same defects: It imposes taxes "even when insurers hail from states imposing lower premium taxes than Texas," and it taxes far beyond the point necessary to "equalize[] * * * tax burden[s]." App., *infra*, 27a-28a.

Other cases have similarly rejected challenges to retaliatory taxes under the Equal Protection Clause or analogous state provisions—even though some of the applications of the taxes were constitutionally dubious. For example, in *Sun Life Assurance Co. of Canada* v. *Manna*, 879 N.E.2d 320, 325-328 (Ill. 2007), the Illinois Supreme Court upheld a retaliatory tax as applied to an *alien* insurer, even though foreign-relations principles precluded the State from seeking to influence the foreign government's policies. In *Premera Blue Cross* v. *State*, 171 P.3d 1110, 1121-1124 (Alaska 2007), the Alaska Supreme Court rejected a challenge to that State's retaliatory tax, even though the evidence that any Alaska insurer had ever done business outside the State was concededly "sparse." In *TIG Insurance Co.* v. *Department of Treasury*, 629 N.W.2d 402 (Mich. 2001), the Michigan Supreme Court overturned a judgment holding unconsti-

tutional an amendment to the State's retaliatory tax statute that prohibited insurance companies from counting mandatory assessments paid to state-organized third-party funds as "taxes" when computing their retaliatory tax. Other cases abound. See, *e.g.*, *Prudential Ins. Co. of Am.* v. *Comm'r of Revenue*, 709 N.E.2d 1096, 1102-1103 (Mass. 1999); *Gallagher* v. *Motors Ins. Corp.*, 605 So. 2d 62, 70-71 (Fla. 1992); *Mut. Life Ins. Co. of N.Y.* v. *Washburn*, 561 N.E.2d 29, 37-38 (Ill. 1990); *Prudential Prop. & Cas. Ins. Co.* v. *Dep't of Treasury*, 725 N.W.2d 477, 484 (Mich. App. 2006); *State Farm Mut. Auto. Ins. Co.* v. *Long*, 497 S.E.2d 451, 455 (N.C. App. 1998) (2-1 decision); *Am. S. Ins. Co.* v. *State*, 674 So. 2d 810, 814-815 (Fla. App. 1996); *Executive Life Ins. Co.* v. *Commonwealth*, 606 A.2d 1282, 1285-1286 (Pa. Cmwlth. 1992).[5] Notwithstanding this Court's 27-year-old decision in *Western & Southern*, therefore, the scope and nature of the equal protection constraints on retaliatory taxes remains an issue that is recurring, hotly disputed, and of substantial importance to the industry.

B. The Texas Supreme Court's Decision Threatens the Stability of the National Retaliatory Tax Network

1. While there is no shortage of constitutional disputes over retaliatory taxes, one is hard pressed to find a decision upholding a more blatant distortion of the system. For years, Texas, like other States, allowed title in-

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[5] The reported cases, moreover, understate the frequency with which such issues arise. For example, Stewart Title challenged an application of Oregon's retaliatory tax on equal protection grounds in a case that later settled. See *State* v. *Stewart Title Guar. Co.*, No. 99C-14628 (Or. Marion County Cir. Ct. filed 1999). And multiple insurance companies were involved in long-running proceedings before the California State Board of Equalization involving similar issues. See, *e.g.*, *Old Republic Nat'l Title Ins. Co.*, Nos. IT ET 34-001644-020, -030 (Cal. State Bd. of Equalization 1998).

surance companies to compute retaliatory taxes by comparing the *actual amounts* they remitted to Texas with the taxes imposed by their home States. That system worked, and made sense, because States collect premium taxes from insurance companies, not their agents. See App., *infra*, 75a-76a (collecting statutes).[6] As a result, the statute made an "apples to apples" comparison: It compared the insurance taxes actually imposed in one State with the insurance taxes actually imposed in the other.

As the court explained below, "[t]his system * * * operated with minimal change until a few years ago when the Comptroller reinterpreted the retaliatory tax statute in a way that sharply increased the tax liability of certain non-Texas title insurers." App., *infra*, 2a. That new interpretation was not prompted by any change in the relevant statutes; it was not accompanied by any new development in who paid whom during a typical title insurance transaction; and it did not reflect anything new about the underlying economics. Rather, the Comptroller simply adopted a new interpretation under which 85% of the tax the insurance company remits to Texas is ignored in comparing tax burdens for purposes of computing retaliatory tax. See *id.* at 5a.

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[6] The statutes cited in the Appendix by their terms impose premium taxes on "insurance companies" or "insurers," not title agents. Petitioners are aware of no other State that, like Texas, has construed such language to mean that part of the tax remitted by the insurance company is actually "paid" by someone else. Respondents have never identified such a State either. Respondents have pointed out that some States, such as California, calculate the insurance company's tax based on net rather than gross premiums. Cf. Pet. App. 18a-19a. But that is beside the point: The relevant fact is that, unlike Texas, those States do not deem part of the premium tax to be paid by another entity that they then exclude from the retaliatory tax calculation.

As the dissent thoroughly explains, that new approach "makes no sense." App., *infra*, 34a. Under the State's "new math," foreign States' taxes will virtually always look much higher than Texas's artificially reduced taxes. See *id.* at 28a. As a result, out-of-state insurers will virtually always pay substantial retaliatory tax in Texas, even when their home State's taxes are *lower* than Texas's. See *ibid.* The only way other States can avoid retaliation is by either (1) reducing their premium tax levels to *15%* of Texas's level; or (2) adopting Texas's novel accounting construct that most of the tax the insurance company remits is deemed "paid" by someone else. Because neither of those could plausibly be expected to occur, the Texas retaliatory tax now simply operates as an arbitrary exaction on out-of-state, and only out-of-state, insurance companies. See *ibid.*

2. The potential consequences of the Texas Supreme Court's ruling are far-reaching. The decision's immediate impact is obvious: Out-of-state title insurers who do business in Texas will pay retaliatory tax in more instances, and in significantly greater amounts, than they did before. The court below admitted as much, noting that the State's new interpretation would "substantially" and "sharply" increase foreign insurers' taxes. App., *infra*, 2a, 5a. For a Minnesota title insurer like Old Republic, the State's new math results in almost a *three-fold increase* in retaliatory tax—and total taxes substantially higher than what either Texas or Minnesota insurers pay in their respective States. See p. 8, *supra*. Out-of-state insurers will also pay retaliatory tax even when their home States impose *lower* premium taxes than Texas does. See App., *infra*, 28a. That impact will continue, year after year, into the indefinite future.

The total impact on the title insurance industry will be substantial. Title insurance is a $14 billion a year industry, with almost one hundred title insurance companies

active across the country. See Am. Land Title Ass'n, *2007 Title Insurance Industry Statistical Analysis: Premiums Earned*, http://www.alta.org/industry/07ALL/07_TitleIndustryStatisticalAnalysis_Fam&Co.xls. Because Texas's artificially reduced tax burden looks much lower than any other State's tax burden, out-of-state title insurance companies will now pay discriminatory taxes in Texas regardless of which State they come from. And those taxes could not come at a worse time for the title insurance industry, which is already being devastated by the nationwide collapse of the real estate market. See A.M. Best Co., *2008 Special Report: Title Insurers Feel the Pain As Housing Market Ills Continue* (Oct. 13, 2008), http://www.alta.org/industry/AMBest08.pdf.

The consequences of the Texas Supreme Court's decision have not gone unnoticed. The decision has already attracted attention—and harsh criticism—from the trade press. See *Texas Court Approves Double Counting of Premium Tax*, Title Insurance Law Newsletter, June 2008, at 4 ("Defying logic and ignoring basic math, the Texas supreme court has approved the Department of Insurance's 'reinterpretation' of the retaliatory tax * * * . The ultimate irony is that a tax which was supposed to equalize tax burdens is interpreted in such a way as to make them hugely disparate."); see also *Texas Comptroller Wins in Retaliatory Tax Dispute, In Spite of Justices' Blistering Dissent*, Legal Description, June 3, 2008.

The decision's impact, moreover, is not limited to the Texas retaliatory tax, nor is it limited to the title insurance industry. Nearly all States have retaliatory taxes, and those statutes apply to all sorts of insurance. See App., *infra*, 73a-74a. Annual premiums in the broader insurance industry are measured in the hundreds of billions of dollars. See A.M. Best Co., *Best's Aggregates & Averages: Property/Casualty* 162 (2008). Although there have been disputes about the constitutionality of particu-

lar applications of those statutes in the past, this case sets a new benchmark for what courts will tolerate. Without changing the statute, the payment mechanics, or the economic realities, Texas was able to *triple* its retaliatory tax revenue simply by adopting "new math." The Texas Supreme Court's approval of that reinterpretation will almost surely embolden other tax officials to attempt similar ploys, particularly in States grappling with budget shortfalls. Unless the court's decision is corrected, other state courts will feel little compunction about sustaining such devices.

The Texas Supreme Court's decision will also encourage other States to take counter-retaliatory measures. Minnesota has already indicated that it may do so: Following the intermediate court's decision in this case, the Minnesota Department of Revenue published a ruling interpreting its own retaliatory tax statute in a way that would result in counter-retaliation against Texas title insurers. See Revenue Notice #06-01, 30 Minn. State Register 1030 (Mar. 27, 2006).[7] The Texas Supreme Court's decision thus invites a potentially endless spiral of retaliation and counter-retaliation. The result will be at best unfair and discriminatory taxation of out-of-state insurers, and at worst a complete breakdown of the interstate retaliatory tax system.

Retaliatory taxes serve their intended equalizing function only if state tax authorities make meaningful, "apples-to-apples" comparisons when measuring relative tax burdens. The State's new interpretation does nothing of the sort, and the Texas Supreme Court's decision uphold-

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[7] The Minnesota revenue ruling accomplishes that result by requiring foreign insurance companies to include any *retaliatory* taxes a Minnesota insurer would pay in the foreign State in comparing relative tax burdens for purposes of computing the Minnesota retaliatory tax. See 30 Minn. State Register at 1030-1031.

ing its approach will have grave consequences for the insurance industry. In light of the importance of this issue, the Court should grant review.[8]

II. The Decision Below Upholds Precisely The Type Of Arbitrary, Discriminatory Taxation Of Non-Resident Insurance Companies That This Court's Precedents Proscribe

Review is also warranted because the Texas Supreme Court's decision authorizes blatant discrimination against non-resident insurance companies. That is precisely the sort of discrimination this Court has long condemned.

A. This Court's Cases Prohibit Arbitrary Discrimination Against Out-of-State Insurance Companies

In cases spanning a century, this Court has refused to rubber-stamp tax statutes that facially discriminate against non-resident insurance companies. The Court addressed the issue most recently in *Metropolitan Life Insurance Co.* v. *Ward*, 470 U.S. 869 (1985). That case concerned the validity of an Alabama premium tax statute that taxed out-of-state insurance companies at a higher rate than domestic insurers. *Id.* at 871-872. The State defended the tax as promoting the formation of new domestic insurance companies and encouraging capital investment in the State. *Id.* at 876, 882. The Court, however, held those interests illegitimate because they constituted "the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent." *Id.* at 878. The "crucial distinction" between Alabama's tax and the retaliatory tax in *Western & Southern*, the Court explained, was that the retaliatory tax in *Western & Southern* served the legitimate purpose of "promot-

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[8] The Court may also wish to consider calling for the views of the Solicitor General, as it did in *Western & Southern*. See n.1, *supra*.

[ing] the *interstate* business of domestic insurers by deterring *other States* from enacting discriminatory or excessive taxes," whereas "Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State." *Id.* at 876-878.

Similarly, in *Hanover Fire Insurance Co.* v. *Harding*, 272 U.S. 494 (1926), this Court struck down a state occupation tax on insurance receipts that applied only to out-of-state insurance companies. *Id.* at 506, 516. The Court condemned the statute as a "heavy discrimination in favor of domestic insurance companies" that effected "a denial of the equal protection of the laws." *Id.* at 516.

In *Reserve Life Insurance Co.* v. *Bowers*, 380 U.S. 258 (1965), this Court summarily reversed a state-court ruling upholding a discriminatory tax on out-of-state insurance companies. The Court cited its earlier decision in *Wheeling Steel Corp.* v. *Glander*, 337 U.S. 562 (1949), which had struck down an Ohio tax on foreign corporations. "It seems obvious that appellants are not accorded equal treatment," the Court observed in *Wheeling Steel*, "and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residen[ce] of the owner." *Id.* at 572. That "discrimination[] den[ied] appellants equal protection of [the] law." *Id.* at 574.

This Court has reached the same result outside the insurance context as well. In *Southern Railway Co.* v. *Greene*, 216 U.S. 400 (1910), for example, the Court struck down a discriminatory tax on foreign corporations on equal protection grounds. The Court conceded that a "reasonable classification is permitted," but cautioned that "such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed." *Id.* a. 417. The classification could not

be "arbitrarily made without any substantial basis." *Ibid.* The State's distinction between domestic and foreign companies did not meet that standard. See *id.* at 417-418.

Likewise, in *WHYY, Inc.* v. *Glassboro*, 393 U.S. 117 (1968), this Court found an equal protection violation where New Jersey denied a tax exemption to a corporation "solely because of [its] foreign incorporation." *Id.* at 119-120. And more recently the Court has held unconstitutional a New Mexico tax exemption for veterans that discriminated on the basis of residence, see *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612 (1985), as well as a Vermont vehicle use tax credit that discriminated on the basis of residence, see *Williams* v. *Vermont*, 472 U.S. 14 (1985).

Thus, even when applying the rational basis test, this Court has treated the Equal Protection Clause as a meaningful and important constraint on arbitrary taxation that discriminates against non-residents. This Court has routinely struck down such taxes where no adequate justification for the discrimination had been shown.

B. Texas's New Interpretation Conflicts with This Court's Precedents

The Texas Supreme Court's holding authorizes blatant discrimination in violation of this Court's decisions. While still superficially a retaliatory tax, the Texas statute now functions as precisely the sort of facially discriminatory tax this Court struck down in *Ward*, *Hanover Fire*, and *Reserve Life*.

1. This Court upheld the retaliatory tax in *Western & Southern* because it had the legitimate purpose of deterring "discriminatory or excessive taxes" in other States and could reasonably be expected to promote that goal. 451 U.S. at 668-674. Texas's new interpretation completely unmoors its statute from that legitimate pur-

pose. Because Texas now "compar[es] 100% of another state's premium taxes with 15% of Texas' premium taxes to determine whether the other state's taxes are excessive," App., *infra*, 34a, the only way other States could avoid retaliation is if they all reduced their premium taxes to *15%* of Texas's stated rate, or if they all adopted Texas's novel accounting construct that deems most of the tax paid by someone other than the insurance company that actually remits it. Those facts undermine the State's reliance on *Western & Southern*.

While Texas has a legitimate interest in encouraging other States to *equalize* tax burdens, see *Western & Southern*, 451 U.S. at 668-671, it has no legitimate interest in coercing other States into reducing their taxes to *15%* of Texas's rate. Nor does it have any legitimate interest in coercing 49 other States to adopt its own anomalous conception of who is actually paying the tax. Even if those were legitimate interests, moreover, no rational legislator could believe that the retaliatory tax would actually promote those goals. There simply is no realistic prospect that 49 other States will all either reduce insurance taxes *six-fold* or completely rearrange their accounting conceptions solely to accommodate Texas's aberrant understanding. For either of those two reasons, the State's new interpretation violates equal protection.

Because Texas now artificially excludes 85% of its tax burdens, the retaliatory tax "no longer operates to discourage excessive taxation in other states," only "to discourage foreign insurers from doing business in Texas." App., *infra*, 28a. The tax thus functions precisely like the parochial taxes this Court has repeatedly struck down. See pp. 25-27, *supra*. Texas should not be allowed to avoid the fate of those other discriminatory taxes merely by pretending that its tax still functions like a valid retaliatory tax.

2. The responses offered by the Texas Supreme Court are unpersuasive. The court found a legitimate purpose because "[t]he Comptroller did not develop this scheme independently as a revenue-raising plan" but was merely implementing "the statutory scheme developed by the Legislature." App., *infra*, 21a. But that is irrelevant. The Constitution binds state legislatures no less than state tax officials. Whether the irrationality originates from the statute or the official charged with enforcing it is immaterial.

The court also defended the Comptroller's new interpretation on the ground that "[a]ll title insurers operating in Texas, whether domestic or foreign, are subject to the 85/15 premium tax division." App., *infra*, 21a-22a. That too is beside the point. The retaliatory tax by its terms applies only to foreign insurers. Tex. Ins. Code art. 21.46, § 1(a) (2004). That both domestic and foreign insurers split premiums the same way does not change the fact that only foreign insurers pay artificially inflated retaliatory taxes based on that division.

The court did no better in asserting that "foreign title insurers are not taxed merely because they are foreign; they are taxed only if their home states impose higher financial obligations on Texas insurers than Texas imposes on foreign insurers," and that the increase in retaliatory taxes under the State's new interpretation thus "depends just as much on premium tax rates charged by other states as it does on the Comptroller crediting title insurers with only 15% of the total premium tax payment." App., *infra*, 22a. Under the Comptroller's new math, the "premium tax rates charged by other states" are practically irrelevant because, with 85% of Texas's taxes artificially excluded, foreign States' taxes will virtually *always* appear much higher. See *id.* at 28a. It thus simply is not true that the retaliatory tax depends "just as much" on the foreign State's tax rate as on the

Comptroller's new accounting device. In any meaningful sense, out-of-state title insurers are indeed taxed "merely because they are foreign."

Finally, the court defended excluding the 85% share of the premium tax allocated to the agent on the ground that the "correct comparison" for purposes of the retaliatory tax "is between the taxes imposed on insurance companies, not insurance premiums or insurance industries." App., *infra*, 22a-23a. That was so, the court believed, because "[t]he equal protection clause guarantees that similarly situated persons—not similarly situated tax schemes or similarly situated industries—be treated similarly." *Id.* at 23a. That argument confuses the disparate treatment being challenged in this case with the State's *rationale* for that disparate treatment. Retaliatory taxes indisputably discriminate among insurance *companies* because they apply only to foreign insurers, not domestic insurers (and impose varying taxes on foreign companies from different States). See *Premera*, 171 P.3d at 1121. The relevant constitutional question is not whether the statute discriminates between insurance companies, but whether the State has an adequate *justification* for that discrimination. And in answering *that* question, the State cannot simply ignore the fact that Texas—unlike every other State—now ignores 85% of the premium taxes it collects when calculating retaliatory taxes. Comparing only tax burdens imposed on insurance companies makes sense so long as both States collect premium taxes only from insurance companies. But it is completely irrational when one State out of 50 deems 85% of the tax collected from insurers to have been "paid" by other entities and then retaliates against other States because their taxes all suddenly look much higher by comparison.

Simply put, the State's new interpretation causes the statute to function, not as a bona fide retaliatory tax like

the one in *Western & Southern*, but as an arbitrary tax on foreign companies. This Court's equal-protection precedents forbid such discrimination, and for good reason: Out-of-state businesses are an easy target for tax authorities seeking to raise revenue from those who lack the means to defend themselves at the ballot box. This Court should not permit Texas to avoid its precedents by disguising arbitrary discrimination in the guise of a retaliatory tax.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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